COPY

FILED
DEC 21 1945
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 473

JOHN D. PENNEKAMP AND THE MIAMI HERALD PUBLISHING COMPANY,

Petitioners,

vs.

THE STATE OF FLORIDA,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE PETITIONERS

ROBERT R. MILAM,
E. T. MCILVAINE,
Greenleaf Building,
Jacksonville 1, Florida;
EDWARD E. FLEMING,
Ingraham Building,
Miami 32, Florida;
ELISHA HANSON,
729 15th Street, N. W.,
Washington 5, D. C.,
Attorneys for Petitioners.

INDEX TO BRIEF

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Question presented	2
Statement of Case	2
A. Citation	3
B. The Answer and Exhibits Thereto	5
Rape Cases	5
Brook Club Cases	7
Teepee Club Case	12
The Grand Jury Report dealing with conditions respecting law enforcement at the time of the editorials	15
The Several Orders of the Circuit Court	17
Opinion of the Supreme Court of Florida	19
Specification of Errors Urged	22
Summary of Argument	22
Argument	24
Point 1. The decision of the Supreme Court of Florida in this case is in conflict with the decision of this Court in *Bridges* v. *California*, 314 U. S. 252, and with state court and federal court decisions adhering to the test laid down in the *Bridges* case	24
Point 2. The action by the Supreme Court of Florida was arbitrary and capricious and should be set aside by this Court	27
Point 3. The Supreme Court of Florida erred in holding that the cases discussed by petitioners were pending at the time of the publications	32
Point 4. The holding of the Supreme Court of Florida that the convictions affirmed do not violate the constitutional guaranty of a free press is in conflict with the decisions of this Court in *Near* v. *Minnesota*, 283 U. S. 697;	

Page

Grosjean v. *American Press Co.*, 297 U. S. 233; *DeJonge* v. *Oregon*, 299 U. S. 353; *Herndon* v. *Lowry*, 301 U. S. 242; *Lovell* v. *Griffin*, 303 U. S. 444; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Bridges* v. *California*, 314 U. S. 252-305; *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Thomas* v. *Collins*, 323 U. S. 516 37

Conclusion 40

Appendix 42

CITATIONS

Cases:

Baumgartner v. *Joughlin*, 105 Fla. 335, 141 So. 185 27

Bridges v. *California*, 314 U. S. 252 (1941), 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 32, 33, 34, 35, 37, 39, 40

Cantwell v. *Connecticut*, 310 U. S. 296 (1940) 23, 24, 37

Craig v. *Hecht*, 263 U. S. 255 (1923) 23, 30, 35

DeJonge v. *Oregon*, 299 U. S. 353 (1937) 23, 37

Ex Parte Earman, 85 Fla. 297, 95 So. 755 ..... 23, 37

Gitlow v. *New York*, 268 U. S. 652 (1925) 40

Graham v. *Jones et al., in re Times-Picayune*, 200 La. 137, 7 So. (2d) 688 27

Grosjean v. *American Press Co.*, 297 U. S. 233 (1936) 23, 37

Herndon v. *Lowry*, 301 U. S. 242 (1937) 23, 37

Lovell v. *Griffin*, 303 U. S. 444 (1938) 23, 37

Murdock v. *Pennsylvania*, 319 U. S. 105 (1943) 24, 37

Near v. *Minnesota*, 283 U. S. 697 (1931) 23, 31, 37

Nixon v. *State*, 207 Ind. 426, 193 N. E. 591 ..... 23, 36

Nye v. *U. S.*, 313 U. S. 33 (1931) 23, 24

People of Virgin Islands v. *Brodhurst*, 148 F. (2d) 636 (C. C. A. 3rd, 1945) 23, 27

State ex rel. Pulitzer Co. v. *Coleman*, 347 Mo. 1238, 152 S. W. (2d) 640 ..... 23, 26

Thomas v. *Collins*, 323 U. S. 516 (1945) 24, 39, 40

Toledo Newspaper Co. v. *U. S.*, 247 U. S. 402 (1918) 24, 37

Constitutional Provisions:

First Amendment to the Constitution of the United States 2, 14, 28, 31, 41

Page

Fourteenth Amendment to the Constitution of the United States 2,14, 25, 28, 38
Sec. 13 of the Declaration of Rights of the State of Florida 2

Statutory Provisions:

Sec. 237 (b) of the Judicial Code, 28 U. S. C. Sec. 344 (b) 1
Sec. 2.01 of the Florida Statutes of 1941 ..... 2, 17, 26
Sec. 38.22 of the Florida Statutes of 1941 2
Sec. 38.23 of the Florida Statutes of 1941 ..... 2, 26, 36
Sec. 64.11 of the Florida Statutes of 1941 ..... 2, 10
Sec. 64.12 of the Florida Statutes of 1941 ..... 2, 14

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 473

JOHN D. PENNEKAMP AND THE MIAMI HERALD PUBLISHING COMPANY,

Petitioners,

vs.

THE STATE OF FLORIDA,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE PETITIONERS

Opinions Below

The judgment of guilt in contempt entered by the Circuit Court of Dade County, Florida (R. 142-145) is unreported.

The opinion of the Supreme Court of Florida (R. 152-172) is reported as *Pennekamp et al. v. State*, 22 So. (2d) 875.

Jurisdiction

The jurisdiction of this Court rests upon Section 237(b) of the Judicial Code as amended (43 Stat. 937, 28 U. S. C., Sec. 344(b)).

Petition for writ of certiorari was filed October 1, 1945, and granted November 5, 1945.

Constitutional and Statutory Provisions Involved

The constitutional provisions involved are the First and the Fourteenth Amendments to the Constitution of the United States and Sec. 13 of the Declaration of Rights of the State of Florida.

The statutory provisions involved are Sec. 2.01 of the Florida Statutes of 1941 incorporating the Common Law of England down to July 4, 1776, where not inconsistent with the Constitution and Laws of the United States and the acts of the Florida Legislature, into the laws of Florida and Secs. 38.22 and 38.23 of the Florida Statutes of 1941 defining contempt of court. Also Secs. 64.11 and 64.12 of the Florida Statutes of 1941.

For the convenience of the Court the constitutional and statutory provisions are set forth in the Appendix attached to this brief.

Question Presented

Whether in a contempt proceeding instituted by state court judges for the purpose of punishing a newspaper and its associate editor for publishing editorials and a cartoon that annoyed the judges, state courts are required to follow the rule laid down by this Court for all courts, state and federal and including this Court, that there must be shown a clear and present danger of high imminence to the administration of justice by the court before there can be a judgment of guilt with resultant punishment.

Statement of the Case

This writ of certiorari brings up for review an opinion of the Supreme Court of Florida (R. 152-172) affirming (two justices dissenting) a judgment of the Circuit Court of

Dade County, Florida (R. 142-145), convicting the petitioners, John D. Pennekamp and The Miami Herald Publishing Company, of contempt for the publication of two editorials (R. 6-9) and a cartoon (R. 8a).

A brief statement of the matters involved giving the ultimate facts was contained in the petition for writ of certiorari. Below these same facts are set forth in more detail with appropriate references to the record.

A. The Citation

On November 10, 1944, the Judges of the Circuit Court of Dade County, Florida, issued a citation charging the petitioners with having published two editorials and a cartoon (R. 1-9), which, the citation charged, imputed that the Judges gave effect to every technicality of the law to block, hinder, embarrass and nullify prosecution. The citation recited that "there were pending in said Court on said date divers cases both at law and in equity involving many questions of law" (R. 1) and charged that these publications "tend to create a distrust for said court and the judges thereof in the minds of the people of this county and state and tend to prevent and prejudice a fair and impartial action of said Court and the Judges in respect to the said pending case."

The citation then set forth three counts, as follows (R. 1-6):

(A) Rape Cases: Wherein it was alleged (R. 2-3) that a motion to quash had been granted in one rape case and the Assistant State Attorney then admitted in open court that similar indictments in other cases "were so defective as to make it advisable that the State not go to trial." Thereupon the citation charged (R. 3) the respondents with having "wilfully or wantonly withheld the full truth from the public . . . by failing to state the act of the

State Attorney's Office" admitting the indictments to be defective. The citation further sought to apply the cartoon to these Rape Cases as representing that the State was not being heard and the defendants were being favored.

(B) BROOK CLUB CASE: Wherein the citation alleged (R. 3-5) that a proceeding to abate a nuisance (gambling) maintained by the Brook Club had been pending and the State Attorney had allowed the time for taking testimony to expire without taking it and upon ample notice to the State Attorney a final decree of dismissal was entered on October 31, 1944. The citation alleged falsity in the editorial in omitting to state that "notice (7 days)" was given to the State Attorney of the final hearing, and in stating that the case appeared "out of blue sky" before Judge Wiseheart. The citation then sought to apply the cartoon also to the Brook Club case. It further charged that the second editorial of November 7, 1944 (R. 9) had emphasized these misleading misrepresentations.

(C) TEEPEE CLUB CASE: Wherein it was alleged (R. 5-6) that the Teepee Club case, brought by the State Attorney to abate a nuisance (gambling) was then pending and that the editorial, after mentioning a denial of temporary injunction because affidavits were relied upon to support the application, stated that while this might be good law and exact judicial evaluation of the Statutes it was, however, the character of legal interpretation which caused people to raise questioning eyebrows and shake confused heads in futile wonderment. The citation sought to apply the cartoon also to this case.

Finally the citation charged (R. 5-6) as to these three Counts that the editorials and cartoon represented to the general public that the judges had not discharged their duties honorably and fairly in respect of these cases, "all of which tends to obstruct and interfere with the said Judges

as such in fairly and impartially administering justice and in the discharging of their duties * * *" (R. 6).

No allegation is to be found anywhere in the citation that either of the editorials or the cartoon created a clear and present danger of high imminence to the fair and impartial administration of justice in pending cases before either of the judges signing the citation.

Petitioners were commanded to appear at 10:00 A. M., November 28, 1944, to show cause why they should not be held and adjudged to be in contempt.

B. The Answer and Exhibits Thereto

On the return day, November 28, 1944, petitioners filed their return under oath (R. 9-19) in which was embodied a motion to quash the citation. The grounds of the motion (R. 9-10), inter alia, were that the publications were not contemptuous but constituted legitimate criticism within the protection of the State and Federal Constitutions; and that the publications presented no clear and present danger to the administration of justice. The return (R. 10) stated that the editorials were intended to be, and in fact were, published in the interest of orderly and fair administration of justice as set out in affidavits attached to and made a part of the return (R. 47-57).

From these exhibits and the answer the following facts appear:

Rape Cases: The petitioners by the answer denied that the Assistant State Attorney had admitted the several indictments in these Rape Cases to be defective and averred that instead the State Attorney had stated, in effect, that he believed the indictments to be in proper form but inasmuch as the Grand Jury was still in session and in order to eliminate any question he would have the defendants reindicted. Respondents denied withholding the truth or any

intention so to do and denied that the cartoon was intended to, or could apply to the Rape Cases (R. 10-12). It further appeared that five indictments for rape had been returned and filed against eight defendants (R. 55). In one of the cases the defendant filed a motion to quash the indictment (R. 55) for an alleged error, due to scrivener's mistake. There was no mention in the then minutes of the court of the Assistant State Attorney agreeing that the indictments were so defective as to make it advisable not to go to trial.[1]

The minutes of the Circuit Court, as later written up and expanded under the court's direction, stated that the Assistant State Attorney "approved" quashal of the indictments (R. 137). The only minutes in existence at the time the editorial was published did not support the court's citation. The corrected minutes were not in existence at the time the editorial was published.

The charge in the citation against the respondent with respect to these rape cases was "failing to state the act of the representative of the State Attorney's office" (R. 3). Entirely new matter was interjected by the court after the trial closed on November 28th. On December 15th, the court filed its findings of fact, stating that "The respondents

---

[1] It is significant in this respect that petitioners in the citation for contempt are accused of willfully and wantonly withholding the full truth from the public and failing to fairly report the action of the court and the judge thereof in respect of said indictments by stating only "that 'Judge Paul D. Barns agreed with the defense that the indictments were not properly drawn' withholding the truth by failing to state the act of the representative of the State Attorney's office." The minutes of the court made on the day the motion to quash was granted, *did not show any concurrence* in the motion by the representative of the State Attorney's office (R. 55). The minutes were subsequently modified by Judge Barns to show such concurrence (R. 137). The Assistant State Attorney present at that time in an affidavit filed for use in the Supreme Court of Florida (in support of the petitions for a writ of certiorari there) denied concurring in the motion. The Miami Herald published a factual story concerning the reindictment of the defendants when they were reindicted. (See footnote *infra*, p. 19.)

did not report to the public that within twenty-four hours after the indictments against eight defendants were found defective • • • has been corrected by a Grand Jury, the prisoners had been arraigned by the court and their cases set for trial by the court, but instead respondent withheld all these facts" (R. 135).

Thus, in these "findings of fact" filed 35 days after the citation issued and 17 days *after the contempt trial* (R. 135), the respondents are for the first time charged with *failure to report to the public* that within twenty-four hours after quashal of the indictments (1) the defendants had been re-indicted; (2) the defendants had been arraigned by the court, (3) their cases had been set for trial. Respondents were not charged in the citation (R. 2) with any such things and were never confronted with the necessity of disproving them.[2]

The editorial complained of concerned the quashed indictments. These indictments had then been disposed of finally. No matter with respect to the quashed indictments was pending. There was no comment or criticism concerning the handling of the new indictments.

Brook Club Case. Answering (R. 12-14) the charge concerning the Brook Club Case, petitioners denied that the case was pending and showed that it had been terminated by final decree of dismissal. They denied that no testimony had been taken, and showed that adversary evidence had been taken before the court, as recited in the court's order of April 25, 1944, granting the temporary injunction. The answer then set forth that the State Attorney, upon receiving notice of the final hearing, notified the court and opposing counsel that he would be engaged before the Grand Jury on the date set for hearing and requested extension of time. The petitioners denied any intent by the editorials or the

[2] See footnote p. 19.

cartoon to interfere with fair and impartial justice; on the contrary, they averred an intent to condemn and criticise the system of pleading and practice and procedure created by the laws whereby causes of public importance could be long delayed and then after such delay dismissed on technical grounds.

There were in reality *two* Brook Club cases. The affidavit of Jeanne Bellamy Bills attached to the answer to the citation (R. 50-57)[3] reveals the following facts: Bill of complaint was originally filed in 1940 (R. 103) by three public officials, the Attorney General of Florida, the State Attorney of Dade County, and the County Solicitor, seeking to have the Brook Club abate the nuisance of conducting a gambling house. Three agents of the Federal Bureau of Investigation made affidavits supporting the bill and stating that the information was furnished to the Attorney General of Florida upon the request of the Director of the Federal Bureau of Investigation (R. 51).

On February 27, 1940, the defendants in this first Brook Club case filed their answer under oath, admitting the operation of a gambling house at the Brook Club and making these significant confessions (R. 52-53):

> "This defendant cannot truthfully disclaim or deny knowledge by it of the facts herein admitted. On the contrary, this defendant, believing that, because of the apathy or sympathy of the local community in which its club is situated and of Dade County generally, the statutes prohibiting gaming would not be strictly enforced by officers of the law, encouraged and cooperated with the operators of the gambling room in the said building. • • •

---

[3] While certified copies of the records in the Brook Club case and the Teepee Club case were filed in evidence at the trial (R. 66-126), the ultimate facts were set forth in the affidavit of Jeanne Bellamy Bills attached to the return and these allegations were not controverted.

"This defendant believed, at the time it consented to and encouraged the use of a portion of its premises for gaming purposes, that it was supplying the demand of a large majority of the inhabitants of the community for well conducted and regulated gambling restricted to persons who could afford and wished, as a pleasurable diversion in the nation's winter playground, to engage in the playing of roulette and other games of chance. This defendant, however, became thoroughly convinced, prior to the institution of this suit, that the Sheriff of Dade County, Florida, and his deputies would no longer tolerate or permit illegal gaming on this defendant's premises or elsewhere in Dade County."

Having thus attempted to purge themselves by confession, they promised in the future to abstain from gambling and protested that the nuisance having been thus abated further proceedings were unnecessary (R. 53).

On February 27, 1940, the selfsame day the answer was filed, Judge Barns accepted the protestation of the Brook Club that no further gambling would be permitted and denied the temporary injunction and stayed further proceedings during the promised good behavior, but retained jurisdiction (R. 53).

On April 28, 1941, 14 months later, a new Attorney General of Florida moved to withdraw as a relator in the case on the ground that the Attorney General, being a State officer, should not inject himself in matters pertaining to local government when it was not shown that local law enforcement had failed (R. 53).

On May 12, 1941, Judge Barns entered an order reciting the statements in the Attorney General's motion, stating that it was necessary to have both plaintiff and defendant in litigation, that the plaintiff had withdrawn, that there remained no plaintiff in the suit, and that therefore the case should be and was thereby dismissed (R. 54). Thus

the threat of immediate restraint hanging over the Brook Club by reason of its admission of law violations and the retention of jurisdiction by the court was removed.

Both the State Attorney and the County Solicitor remained as relators in this suit, although the court recited there was no party plaintiff remaining. The Florida Statute under which this case was brought provided that the State's Attorney, the County Solicitor or any citizen of the County might maintain "in the name of the State of Florida" such a suit to enjoin the nuisance of gambling (Sec. 64.11, Florida Statutes 1941, quoted in appendix hereto).

Second Brook Club Case. On March 22, 1944, the State's Attorney (not the Attorney General) filed a second suit against the Brook Club to abate a renewed outburst of gambling there (R. 99). The bill of complaint (R. 99-105) recited in detail the former suit and that the promise to abstain from gambling was "utterly worthless" and had been flagrantly violated.

The case was heard by Judge Holt on motion to dismiss, urging that the Circuit Court was without jurisdiction to grant an injunction unless it was shown that law enforcement officials other than the State Attorney were not enforcing the law (R. 113-114). This motion was denied (R. 115-116).

On April 20, 1944, after various postponements, the case came on before Judge Holt on hearing for temporary injunction. Testimony was taken in open court. Witnesses appeared, were sworn and testified (R. 55). On April 25, 1944, temporary injunction was granted (R. 121). The court in its order recited that it had "considered the evidence submitted by the Plaintiff, none having been offered by the defendants" (R. 121).

On May 1, 1944, answer was filed (R. 122-124) wherein

it was admitted that there was some gambling at the Brook Club, but alleging it was only sporadic. The defendants admitted the acts of gambling proven by witnesses on the hearing—denied gambling at any other time.

On August 14, 1944, the defendants moved for a decree on pleadings because no testimony had been taken (R. 124-125).

On October 24, 1944, the solicitors for The Brook Club, Inc. served upon the State's Attorney notice that they would call up the case before Judge Wisecart (not Judge Holt to whom the case was assigned and who had taken the testimony on temporary injunction), on October 31, 1944, for argument and disposition (R. 125-126). Thereupon, the State Attorney "immediately notified" both the secretary to Judge Wisecart and the counsel for the Brook Club that the Grand Jury was reconvening on October 30, 1944 (the day before the hearing set), and that the State Attorney would be constantly engaged from day to day until the Grand Jury was discharged early in November (R. 12). The State Attorney requested that this hearing be deferred until the Grand Jury recessed (R. 13). On October 31st, notwithstanding the State Attorney was then engrossed in his duties before the Grand Jury, the case was heard in his absence and dismissed by final decree (R. 13). The reconvening of the Grand Jury had been fixed long before this notice was given, and the time of the State Attorney—who was personally handling the Brook Club case (R. 12) had been committed to the work before the Grand Jury.

The case had been finally disposed of by the decree of dismissal on October 31st, two days before the first editorial and seven days before the second editorial was published.

The findings of fact filed by the Circuit Judges on December 15th, 1944 (R. 135) were, as to the Brook Club case, meager—they recited some, but by no means all, of the

material facts appearing in the record and set out above, and denominated the editorials "semi-factual". Such findings of fact state that (1) Judge Wiseheart dismissed the suit "the State Attorney not making any motion for continuance or postponement of the hearing," and that (2) the Brook Club case "was never further prosecuted by the State Attorney as was his privilege if he deemed it advisable."

TEEPEE CLUB CASE: Answering (R. 14-15) the charge in the citation concerning the Teepee Club case, petitioners denied making any false imputation or representing by the cartoon that the public was not being favored, and averred an intent instead to criticise the system of pleading and practice. They alleged that the editorial referred to an order signed by Judge Holt on October 4, 1944, denying a temporary injunction and that such matter was no longer pending.

The Teepee Club case was another suit to enjoin the operation of a gambling house. The history of the Teepee Club appears in the record as follows (R. 66-91):

During the year and more preceding September, 1944, there had been two convictions for using the Teepee Club for the operation of a gambling house.

One defendant arrested a year before for conducting gambling on the premises had not yet been brought to trial.

On September 18, 1944, deputy sheriffs raided the premises and took the names of some nineteen persons, employees and patrons. The officials observed there the usual paraphernalia for race track gambling.

On September 21, 1944, various of these persons were brought before the State Attorney, sworn, testified and made affidavit to the conducting of gambling upon the premises.

On September 23, 1944, the State's Attorney filed bill of complaint to enjoin the use of the premises for gambling. All of the above facts and others were recited therein (R. 66).

On October 11, 1944, hearing for temporary injunction was had before Judge Holt. Various witnesses appeared and testified orally, albeit unwillingly and evasively (R. 72-90). The main defendant refused to testify as tending to incriminate him. The State Attorney in addition introduced the transcript of testimony of six witnesses theretofore examined by him under oath, five of whom had signed and sworn to their transcripts (R. 72).

On October 11, 1944, Judge Holt made an order denying the application for temporary injunction (R. 91-92) and castigated the State Attorney for submitting and using affidavits. Judge Holt assailed the dependability of affidavits and in his order said:

> "The defendant cannot cross-examine an affidavit. The Court cannot determine who is testifying and whether reliance can be placed upon such testimony. The manner and demeanor of the witness while testifying is lacking.
>
> "It is an old saying (and a true one) that 'anybody will sign an affidavit' and 'you can prove anything by an affidavit.' The fact that such affidavits were taken before the State Attorney does not give them any additional weight or value. It would be a vicious and unfair practice to take property upon such proof, (if it can be called such)."

On October 11, 1944, the State Attorney filed a motion for reconsideration (R. 93). With respect to the Court's denial of the right to use affidavits the petition stated:

> "While numerous other difficulties seemed to have been encountered by the State in the past on applications to suppress gambling houses as statutory public

nuisances, so far as can be ascertained this is the first instance in which the use of affidavits has been assigned as a reason for refusing to enjoin."

On October 12th the court denied this petition for reconsideration (R. 98).

The sworn answer of the petitioners filed below stated (R. 15):

(a) "It has long been the practice both by common usage and by practice in the State of Florida to sustain and grant temporary injunctions and receiverships solely upon affidavits."

(b) "The judge in refusing to consider the affidavits submitted in support of the application for said injunction was acting contrary to the practice usually pursued in such cases."

Section 64.12 Florida Statutes 1941, with respect to this class of injunction to abate nuisances reads as follows:

"If it shall appear to the satisfaction of the court, judge or court commissioner by evidence or *by affidavit* that a temporary injunction shall issue, the court, judge or court commissioner may in his discretion . . ." (Emphasis supplied.)

On November 2nd, concerning this ruling in the Teepee Club case, the editorial stated (R. 8) as follows:

"On Oct. 10 Judge Holt had before him a suit by the state to abate a nuisance (bookmaking) at the Teepee Club.

"Five affidavits of persons who allegedly visited the premises for the purpose of placing bets were introduced by the state over the objection of the defendants.

"Judge Holt ruled them out, explaining in denying the injunction against the Teepee Club:

"'The defendant cannot cross-examine an affidavit. The court cannot determine who is testifying and whether belief can be placed upon such testimony . . .

> The fact that such affidavits were taken before the State Attorney does not give them any additional weight or value.'
>
> "This may be good law, exact judicial evaluation of the statutes. It is, however, the character of legal interpretation which causes people to raise questioning eyebrows and shake confused heads in futile wonderment."

When this editorial was published, the matter of the temporary injunction was no longer pending.

The Grand Jury Report

Three days after the issuance of the citation for contempt the Grand Jury of Dade County, Florida, filed its report, which report was attached to the answer of the defendants in the contempt proceedings (R. 19-47). The insistence of the Miami Herald and its editor that law enforcement needed drastic improvement is borne out by this Grand Jury's report covering the period discussed by the editorials. The judges below who cited these respondents brushed off the Grand Jury's report in their judgment of guilt with the following comment:

> "The subsequent Grand Jury report can not avail the respondents anything since it is in no wise related to the subject-matter of the editorial and cartoon; to-wit, judicial acts, and also because the report was made many days after the publication of the editorials" (R. 143).

The sworn response to the citation filed in the Circuit Court stated that general law enforcement in Dade County had broken down and had been subjected to wide-spread public comment and criticism; and it thereby became the right, if not the duty, of newspapers and other vehicles of public information to comment upon such a situation. It stated that this deplorable condition with respect to law

enforcement existed at the time the editorials were issued and that "this general situation and public concern therewith is reflected in the report of the grand jury," dated November 13, 1944. It invoked the Grand Jury's report as proof of the condition that the Miami Herald and its associate editor, Mr. Pennekamp, sought to have remedied (R. 15-16). The answer then commented upon the findings in the Grand Jury report which were true at the time the editorials were published and to which general condition of lawlessness the editorials were directed. The Grand Jury report showed, for instance, that gambling in Dade County had become an organized industry and that protection was afforded the so-called big operators, notorious for the vicious control that they exercised by lawless means over this undercover industry and for their baneful influence on law enforcement officers.

The Grand Jury report showed that the Grand Jury had called upon the county solicitor to furnish data on all cases handled by him for a 2-year period, which data he refused to give. The Grand Jurors then determined from the public records that in this 2-year period evidence in 132 felony cases was submitted to the county solicitor. The disposition of these 132 cases was as follows:

55 cases were dismissed, neither court nor jury passing upon the guilt or innocence of the accused.
5 were tried and acquitted.
70 either pled guilty or were tried and found guilty, none being sentenced to any imprisonment, but paying fines averaging less than $200.00.
2 were tried, found guilty and sentenced to six months' imprisonment.

Relevant provisions of the Grand Jury report were set forth in the response itself. The so-called "liberal policy" of law enforcement (such as relied upon by the operators of the Brook Club) permitting gambling and other forms of

vice to operate was indicted and criticized in the report. The Grand Jury report stated that the laws generally "are all in favor of the criminals * * * there are entirely too many loopholes." It invoked the interest of citizens generally to take an active and sustained interest in this matter in order that first-hand information be given the public, so that the public conscience be aroused to the end that the deplorable situation might cease.

The Several Orders of the Circuit Court

The Circuit Court staggered its decision over a period of nearly a month by making separate orders on different phases of the case. In all three orders were issued:

I. On December 9, 1944, the judges entered an order denying the motion to quash the citation (R. 127). Therein the judges found that the court had been criticised for deciding points of law in cases adverse to the State Attorney and that the newspaper had made an unfair and untrue report and false imputations based upon such unfair and untrue report. The court denied that it was necessary that the citation allege a clear and present danger and, in effect, held that alleging a "tendency" was the same as alleging the existence of a "clear and present and imminent danger." The court further cited Section 2.01, Florida Statutes, 1941, and held that as to contempt by publications out of the presence of the court the common law prevailed. And the court held that the cases were pending because they were still open for modification or rehearing.

II. On December 15, 1944, the judges made an order entitled "Findings of Fact" referring to all three cases (R. 133):

> (a) As to the RAPE CASES—A photostatic copy of the Court Minutes of October 30, 1944 (R. 137), stating that the Assistant State Attorney "*approved*" the

granting of the motion to quash was attached to the Findings of Fact. The court found that within twenty-four hours new indictments were returned and the cases reset for trial. The court found that the respondents applied the cartoon to the Rape Cases and failed to report to the public the reindictments and resetting of the Rape Cases.

(b) As to the BROOK CLUB CASE, the findings set forth that the case became at issue on May 11, 1944 but was never further prosecuted by the State Attorney and was dismissed, the State Attorney not making any motion for postponement. It found that the editorial was "semi-factual."

(c) As to the TEEPEE CLUB CASE, the findings did not state anything to be false but stated that the court's order in this case contained the exact language quoted in the editorial.

III. On December 18, 1944, the judges entered an order entitled "Judgment of Guilt in Contempt" (R. 142). With respect to the answer it was held that wherein it was inconsistent with the court records, the records would prevail; that the editorials were unambiguous and the response would therefore be ignored; that the Grand Jury report could not avail the petitioners because made after the publication; and that the affidavits attached were also unavailing for the same reasons. It was held that the newspaper did in fact misinform the public about the court's proceedings and thereupon the respondents were convicted of contempt for making an unfair and untrue report of court proceedings and unfair and untrue imputations based thereon. Fines were assessed against John D. Pennekamp for $250.00 and against The Miami Herald Publishing Company for $1,000.00 and provision made for issuance of execution.

Opinion of the Supreme Court of Florida

Appeal from the judgment of the Circuit Court of Dade County was duly filed in the Supreme Court of Florida, where a hearing was held by the full Court on May 4, 1945.

On July 24, 1945, the Supreme Court of Florida by a five-to-two opinion affirmed the judgment of contempt entered by the Circuit Court (R. 152).[4]

The Supreme Court of Florida divided on the issue as to whether the decision of this Court in the case of *Bridges* v. *California*, 314 U. S. 252 (1941), is binding upon the courts

---

[4] NOTE. Out of an abundance of caution, the case was taken from the lower court to the Florida Supreme Court both on certiorari. (*John D. Pennekamp and The Miami Herald Publishing Company, Petitioners*, v. *The Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida, Respondent*) and by appeal (*In re; John D. Pennekamp and The Miami Herald Publishing Company, Appellants.* The preferable procedure in the opinion of petitioners' counsel was by certiorari.

The records on appeal and by certiorari in the Supreme Court of Florida were identical except that attached to petition for writ of certiorari were the following exhibits not appearing in the appeal record:

1. Photostatic copy of the minutes made by the Clerk of the Circuit Court in Dade County at the time of the ruling (Ex. 1) on the rape indictments which made no reference to any alleged agreement by the State's Attorney that the original rape indictments were defective or consent by the State's Attorney that they be dismissed, the matters charged in the citation and in the judgment as a wilful suppression of fact. These were the only minutes that existed when the editorial was published.

2. Photostatic copy of the minutes of the Circuit Court as later expanded at the direction of Judge Barns after the publication of the editorial and cartoon (Ex. 2) to state there was such an agreement and consent by the State's Attorney.

3. Affidavit of Assistant State Attorney (Ex. 3) stating that he did not concede that the indictments in the rape cases were defective but, because the Grand Jury was still in session and to obviate any question, he would have new indictments returned.

4. Photostatic copy of newspaper item in the Miami Herald of November 1st stating the rape defendants had been duly reindicted and arraigned for trial (Ex. 4).

Although certiorari or habeas corpus had theretofore been the accepted method of review, the Florida Supreme Court ruled on February 27, 1945, that appeal was in this case the proper method.

of Florida. The majority opinion held that the rule, laid down in the *Bridges* case was not applicable to this case stating in part:

> • • • *we find nothing in the Bridges case indicating a purpose to supersede state law and decisions on the question or to require state courts to conform to Federal pattern.* (R. 165.)
>
> "It necessarily follows that the only question that can properly be raised here goes to the reasonableness, arbitrariness, or the discriminatory character of the contempt judgment or the Florida law under which it was imposed. This question appellants have by-passed and have elected to stand on their immunity from punishment under the Fourteenth Amendment.
>
> "If appellant's theory that the judgment appealed from abridges their liberty of the press as guaranteed by the First and Fourteenth Amendments to the Federal Constitution is pursued to its ultimate conclusion, it necessarily follows *that the power of the States in the premises is abrogated.* We do not think the Bridges case is susceptible to that interpretation. We think that the reservations to the States in the Tenth Amendment are still vital, that State Courts still have the power when properly authorized to punish for contempt and *if not unreasonably or arbitrarily exercised*, their judgments will be upheld. We have examined the editorials and the telegram involved in the Bridges case and we find nothing in them assaulting the integrity of the court. They would not have been contemptuous under the rule in the Hayes case (R. 166).
>
> "The ultimate test in the Bridges case requires that the 'Substantive evil must be extremely serious and the degree of imminence extremely high before the utterances can be punished'. Even if this test is to the rule in the State Courts, they are authorized to apply it by their own law and standards and unless the application is shown to be arbitrary and unreasonable, their judgment should not be disturbed. • • •

"We therefore hold that the cartoon and the editorials afford ample support for the judgment imposed and that the issues were *properly adjudicated under* Florida law. We do not think that the rule in the Bridges case is applicable but if for any reason it may be held to be the judgment is still free from error because it is not charged that it was applied in an arbitrary or unreasonable manner and if it were, there is no showing to that effect. We do not think freedom of the press can be exercised in a way to vitiate fair and impartial trial nor do we think that it can be employed to harass the court in total disregard of approved standards of propriety when the rights of others to the case are adversely affected" (R. 170-171). (Emphasis supplied.)

A dissenting opinion filed by Mr. Associate Justice Buford and concurred in by Mr. Associate Justice Sebring declared there was nothing in either of the editorials or cartoon which

"imputes a want of fairness, impartiality or integrity to any Judge or any Court. Nor do they appear to have for their purpose or intent the influencing or controlling the determination of the result in any particular case *then pending* in any court. They appear to adversely criticise a judicial system which, to protect the rights of the righteous must, by the same token, see that the alleged rights of the unrighteous are determined." (R. 171.)

The dissent further stated:

"* * * I think the Bridges case is binding and that in the absence of showing of *clear* and *present danger* of influencing or controlling the determination in any particular case, then pending in any court, created by the publication complained of, no punishable contempt is made to appear." (R. 172.) (Emphasis as it appears in dissenting opinion.)

Specification of Errors Urged

The Supreme Court of Florida erred:

1. In holding, contrary to the decision of this Court in the *Bridges* case, that the common law rule or statutory rule of Florida governed in determining that publications could be summarily punished as contempt of court without a showing of clear and present danger of high imminence to the administration of justice.

2. In arbitrarily and capriciously affirming the judgment of conviction based upon a mere allegation of tendency to interfere with the fair and impartial administration of justice, when, under the decisions of this court in the *Bridges* and other cases a conviction could be sustained only upon proof of a clear and present danger of high imminence.

3. In holding that the cases discussed were pending and as such were not subject to editorial comment in the manner commented upon by petitioners.

4. In holding that the convictions affirmed do not violate the constitutional guaranty of a free press.

5. In affirming the judgment of the Circuit Court of Dade County, Florida.

Summary of Argument

Point 1. The decision of the Supreme Court of Florida, upholding the conviction of petitioners for contempt in a proceeding based upon an allegation that petitioners' utterances merely tended to prevent and prejudice a fair and impartial action of the court and the judges thereof, is in conflict with the decision of this Court in *Bridges* v. *California*, *supra*, and with state and federal court decisions adhering to the test laid down in the *Bridges* case. In effect

the Supreme Court of Florida has challenged the application of the *Bridges* case to contempt proceedings instituted by judges in that state and has ruled that such proceedings are properly settled under the laws of Florida without reference to the holding of this court. If the decision of the Florida Supreme Court is not set aside by this Court then the whole purpose of the *Bridges* case to lay down a test applicable to both state and federal courts will have been defeated.

Point 2. The record in this case shows that the citation upon which hearing was held with the resulting conviction of petitioners, which conviction was affirmed by the Supreme Court of Florida, nowhere alleged that the acts of petitioners created any clear and present danger of high imminence to the fair and impartial administration of justice. The decision, therefore, is in conflict with the decision of this Court in *Bridges* v. *California, supra; Nye* v. *U. S.*, 313 U. S. 33 (1941); and *Near* v. *Minnesota*, 283 U. S. 697 (1931).

Point 3. The record is indisputable that none of the cases discussed in the editorials was pending before the court at the time the editorials and cartoon were printed. *Craig* v. *Hecht*, 263 U. S. 255 (1923); *People of Virgin Islands* v. *Brodhurst*, 148 F. (2d) 636 (C. C. A. 3rd, 1945); *State ex rel. Pulitzer Co.* v. *Coleman*, 347 Mo. 1238, 152 S. W. (2d) 640 (1941); *Ex Parte Earman*, 85 Fla. 297, 95 So. 755, (1923); *Nixon* v. *State*, 207 Ind. 426, 193 N. E. 591 (1935).

Point 4. The holding of the Supreme Court of Florida that the convictions affirmed do not violate the constitutional guaranty of a free press is in conflict with the decisions of this Court in *Near* v. *Minnesota, supra; Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936); *DeJonge* v. *Oregon*, 299 U. S. 353 (1937); *Herndon* v. *Lowry*, 301 U. S. 242 (1937); *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *Cantwell*

v. *Connecticut*, 310 U. S. 296 (1940); *Bridges* v. *California*, *supra*; *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *Thomas* v. *Collins*, 323 U. S. 516 (1945). Each of these cases related in one way or another to restraint of free speech or the free press. Each of them held that these liberties cannot be restrained. This Court has held that such subsequent punishment for abuses as may exist (but not contempt) is the appropriate remedy consistent with constitutional privilege. The procedure invoked by the Circuit Court judges in this case resulting in the conviction as affirmed by the Supreme Court of Florida is repugnant to the guaranty of a free press.

ARGUMENT

Point I

The decision of the Supreme Court of Florida in this case is in conflict with the decision of this Court in Bridges v. California, supra, and with state court and federal court decisions adhering to the test laid down in the Bridges case.

In *Bridges* v. *California*, *supra*, this Court measured a power of all American courts, both state and federal. It said that the possibility of disrespect for the judiciary as the result of the published criticism of a judge is not such a substantive evil as will justify impairment of the constitutional right of freedom of speech and press.

For all time it disposed of the contention that the English common law is applicable on questions concerning liberty of speech and the press.

Further it reaffirmed the decision in *Nye* v. *United States*, *supra*, overruling *Toledo Newspaper Company* v. *United States*, 247 U. S. 402 (1918). The *Toledo* case applied the reasonable tendency test. The *Nye* case ruled flatly that

courts have power to punish for contempt only where there is a clear and present danger of high imminence.

A tendency to obstruct was all that was alleged in the citation directed to petitioners. It was upon that charge and that charge alone they were convicted and their conviction affirmed by the Supreme Court of Florida.

The Supreme Court of Florida in its opinion in addition to challenging this Court's decision in the *Bridges* case also challenged this Court's holding that the Fourteenth Amendment prohibits infringement by state legislatures of those rights and liberties guaranteed against infringement by Congress in the federal constitution (R. 166). After so asserting its challenge, the Florida Court said:

> "It necessarily follows that the only question that can properly be raised here goes to the reasonableness, arbitrariness or the discriminatory character of the contempt judgment or the Florida law under which it was imposed. This question appellants (petitioners herein) have by-passed and have elected to stand on their immunity from punishment under the Fourteenth Amendment" (R. 166).

The court concluded its opinion by saying:

> "We therefore hold that the cartoon and the editorials afford ample support for the judgment imposed and that the issues were properly adjudicated under Florida law. We do not think that the rule in the Bridges case is applicable but if for any reason it may be held to be the judgment is still free from error because it is not charged that it was applied in an arbitrary or unreasonable manner and if it were, there is no showing to that effect. We do not think freedom of the press can be exercised in a way to vitiate fair and impartial trial nor do we think that it can be employed to harass the court or in total disregard of approved standards of propriety when the rights of others to the cause are adversely affected" (R. 171).

Two judges of the Florida Supreme Court refused to concur in the decision. In a dissenting opinion they said—

> "• • • there is nothing in either (the editorials and cartoon) which imputes a want of fairness, impartiality or integrity to any Judge or any Court. • • • They appear to adversely criticise a judicial system which, to protect the rights of the righteous must, by the same token, see that the alleged rights of the unrighteous are determined" (R. 171).

The dissenting judges insisted the rule in the *Bridges* case is binding and should be applied:

> "• • • I think the Bridges case is binding and that in the absence of showing of *clear* and *present danger* of influencing or controlling the determination in any particular case, then pending in any court, created by the publication complained of, no punishable contempt is made to appear." (Judge Buford, R. 172.)
>
> "I concur with the conclusion reached (by Judge Buford) that the judgment appealed from must be reversed on the authority of Bridges v. California, 314 U. S. 252." (Judge Sebring, R. 172.)

As for the Florida law, it contains no definition of contempt by publication (See Sec. 38.23 of the Florida Statutes of 1941). The Florida statutes do provide, however, that the common law of England down to July 4, 1776, shall be in force in Florida provided it is not inconsistent with the Constitution and laws of the United States and the Acts of the legislature of Florida. (Sec. 2.01 Florida Statutes, 1941).

Thus it was under the ancient English common law that petitioners were cited, convicted and their conviction affirmed by the Florida Supreme Court, in conflict with this Court's decision in *Bridges* v. *California, supra:*

> "The English common law is inapplicable in this country on questions concerning liberty of speech and press." (Headnote 4, *Bridges* v. *California, supra.*)

Since the *Bridges* case was decided, the Florida Supreme Court is the only court that has refused to follow it. The Third Circuit Court of Appeals recognized its force in the case of *People of Virgin Islands* v. *Brodhurst, supra;* and the Supreme Court of Louisiana followed it in *Graham* v. *Jones et al. in re Times-Picayune,* 200 La. 137, 7 So. (2d) 688 (1945).[5]

POINT 2

The action by the Supreme Court of Florida was arbitrary and capricious and should be set aside by this Court.

The action by the Supreme Court of Florida was arbitrary and capricious. It was aimed at enforcing silence in the name of preserving the dignity of the bench. It must be recalled that the editorials and cartoon referred to no matters pending at the time they were published. The Brook Club case had been dismissed by Judge Wiseheart; the Teepee Club case had been effectively disposed of when the application for temporary injunction was denied by Judge Holt; the rape indictments had been quashed by Judge Barns.

The citation did not even allege that the comments of petitioners created any clear and present danger of high imminence to the administration of justice. The Florida Supreme Court recognized this and in so doing it revived the ancient English common law concept of the power of judges to punish summarily for contempt in order to affirm the convictions. It sought to set up one rule for judges; another one for all other public officials who consider themselves injured by newspaper comment.

---

[5] Interestingly, this *Times-Picayune* case quoted as an excellent example of the "tendency" rule the Florida Supreme Court case of *Baumgartner* v. *Joughlin,* 105 Fla. 335, 141 So. 185, and then proceeded to point out that such rule had theretofore been the rule in Louisiana but was superseded by rule announced in *Bridges* v. *California, supra.*

What the Florida Supreme Court has done in effect is to say to this Court:

> "In Florida, judges have the right and may exercise the power if they so desire, to punish any one in a contempt proceeding whose comment concerning their activities annoys them. The First Amendment, and the Fourteenth Amendment to the Constitution of the United States do not apply in Florida. The decisions of the Supreme Court of the United States have no binding force and effect upon the courts of Florida."

As against this position this Court has said:

> "• • • The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however, limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion and contempt much more than it would enhance respect." • • •
>
> "• • • The very word 'trial' connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting hall, the radio and the newspaper. But we cannot start with the assumption that publications of the kind here involved actually do threaten to change the nature of legal trials, and that to preserve judicial impartiality, it is necessary for judges to have a contempt power by which they can close all channels of public expression to all matters which touch upon pending cases." *Bridges* v. *California, supra,* at pp. 270-271.

As an illustration of the capricious and arbitrary length to which the Florida court went, reference is made to this statement in the majority opinion:

> "We have searched the text books and the cases diligently and we find nothing to support the conten-

tion of one of counsel for appellants that freedom of the press protects him if he chooses to lie about the Court and that the Court can do nothing about it unless he lies in the courtroom or his lying is 'manifested with such a high degree of imminence as to express a high degree of threat.'" (R. 170.)

The record contains no justification for that statement. Counsel made no such contention. Judge Barns in putting a series of questions to counsel as to whether a newspaper could lie about the court with impunity said he asked them without application to petitioners herein and merely academically. Foreseeing, however, that the imputation that The Miami Herald and Mr. Pennekamp had "lied about the court" would arise later in the case (as it did in the "Findings of Fact" of Judge Barns (R. 143, 144) and in the opinion of the Supreme Court of Florida) the implied charge of "lying" was promptly challenged at the trial:

"We submit that there was no such thing" (R. 64);

and counsel stated they wished to bring the case back to the real issue; and that the actual records of the court in these gambling house cases would have justified "even stronger statements than were made" (R. 64). The purpose of the questions obviously was to force counsel into an admission that judges have greater rights than other public officials in respect of criticism of their actions. Counsel's replies were that they have no greater, no lesser rights; and whether the articles complained of were true or false, judges had to respect the constitutional guaranties and avail themselves of the appropriate remedy. No sweeping claim of absolute immunity for the press was advanced. The remedy of subsequent punishment was fairly stated as the one to be applied when abuses actually occurred (R. 58-61).

This Court has held that a judge has no greater and no lesser rights than any other citizen in respect of remedies for libel, slander, and the like. As the late Mr. Chief Justice Taft in his concurring opinion in *Craig* v. *Hecht*, *supra*, said:

> "If the publication criticizes the judge or court after the matter with which the criticism has to do has been finally adjudicated and the proceedings are ended, so that the carrying of the court's judgment cannot be thereby obstructed, the publication is not contempt and cannot be summarily punished by the court, however false, malicious, or unjust it may be. The remedy of the judge as an individual is by action or prosecution for libel." (263 U. S. at p. 278.)

Also, as the late Mr. Justice Holmes said in his dissent in the same case in which the late Mr. Justice Brandeis concurred:

> "A man cannot be summarily laid by the heels because his words may make public feeling more unfavorable in case the judge should be asked to act at some later date, any more than he can for exciting public feeling against a judge for what he already has done." (263 U. S. at pp. 281-282.)

The record in this case demonstrates that the judges who issued the citation were annoyed by the publications of petitioners and, as Mr. Justice Holmes said, attempted to lay petitioners by the heels because of their annoyance. This is forcibly illustrated by the finding of fact that petitioners having published certain information concerning the quashing of the indictments in the two cases "did not report to the public that within twenty-four hours after indictments against eight defendants were found defective * * * (they) has been corrected by the grand jury, the prisoners had been arraigned by the Court and their cases set for trial by the Court, but instead respondents (petitioners here) with-

held all these facts" (R. 135). It is indisputable that petitioners did not withhold any of the facts. As was pointed out in petitioners' petition for certiorari, page 9, petitioners herein reported the fact of the reindictment of the eight defendants in the rape cases after the original indictments had been quashed. This was not denied by the respondent.

But even had petitioners failed to report the facts as to the reindictment of the eight defendants in the rape cases, the complaining judges were without authority to penalize them for that failure. As was stated by Mr. Chief Justice Hughes in *Near* v. *Minnesota, supra:*

> "If the publisher has a right, without previous restraint, to publish them (comment upon public officials or their acts), his right cannot be deemed to be dependent upon his publishing something else, more or less, with the matter to which objection is made." (283 U. S. at p. 720.)

The order denying petitioners' motion to quash the citation, the findings of fact made by the judges who issued that citation, and the order finding the petitioners guilty of contempt are conclusive evidence that what the judges in this case sought to do was to control the utterances of petitioners in their newspaper, The Miami Herald. No more deliberate effort to restrain freedom of the press as guaranteed by the First Amendment can be imagined.

There was far more involved here than the Teepee Club, the Brook Club and the Rape Cases. Law enforcement in Dade County had failed miserably. Those violating the law were widely escaping punishment, even indictment. Those accused were with few exceptions either released on artificial defenses or, upon conviction, were being given small fines and turned loose for further violations. Enforcement was notoriously bad.

The forepart of the editorial of November 2nd deplored judicial action or interpretation that found every technicality of the law to protect the defendant and to nullify prosecution. It stated that this set people to wondering whether their courts were being subverted into refuges for law breakers. That this general condition so commented upon in the editorial was bad, even alarming, was more than established by the Grand Jury report, issued three days after the citation herein and before the trial. The Grand Jury report showed, statistically, the appalling number of criminals that were escaping punishment and the pitiably few that were being punished. It revealed a vast gambling ring financed and managed by gangsters with little interference by the police officers and a startling ineffectiveness in the courts to punish those brought before them. The Grand Jurors criticised pointedly the conditions to which these editorials and cartoon were directed.

The editorials illustrated this general ineffectiveness of the courts. The cartoon obviously applied to no particular case. The story of the Brook Club case was truly a sordid one; and that of the Teepee Club no better.

The action by the Supreme Court of Florida in upholding petitioners' convictions under the circumstances in this case was arbitrary and capricious and should be set aside by this Court. There was no clear and present danger of high imminence to the administration of justice in anything petitioners did or said.

POINT 3

The Supreme Court of Florida erred in holding that the cases discussed by petitioners were pending at the time of the publications.

For many years there was a great divergence of opinion as to what constitutes a pending case. Prior to the decision of this Court in *Bridges* v. *California*, *supra*, convictions of contempt were upheld or set aside in many in-

stances by a particular court before which they came for review on that court's concept of what constitutes a pending case. In *Bridges* v. *California*, however, this Court held that a publication is not to be denied the constitutional protection of freedom of the press merely because it concerns a judicial proceeding still pending in the courts.

As this Court said in *Bridges* v. *California*:

"• • • the argument runs, the power of judges to punish by contempt out-of-court publications tending to obstruct the orderly and fair administration of justice in a pending case was deeply rooted in English common law at the time the Constitution was adopted. That this historical contention is dubious has been persuasively argued elsewhere. • • •. In any event it need not detain us, for to assume that English common law in this field became ours is to deny the generally accepted historical belief that 'one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press.'

"• • • the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society. • • •

"• • • The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect. • • •

And again:

"• • • it must be recognized that public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist. Since they punish

utterances made during the pendency of a case, the judgments below therefore produce their restrictive results at the precise time when public interest in the matters discussed would naturally be at its height. Moreover, the ban is likely to fall not only at a crucial time but upon the most important topics of discussion. Here, for example, labor controversies were the topics of some of the publications. Experience shows that the more acute labor controversies are, the more likely it is that in some aspect they will get into court. It is therefore the controversies that command most interest that the decisions below would remove from the arena of public discussion.

The minority opinion in *Bridges* v. *California* discussed when a matter (not necessarily the entire case) may be deemed pending or not pending, observing, at page 304 that "when a case is pending is not a technical lawyer's problem, but is to be determined by the substantial realities of the specific situation", and, at page 291, that to be contemptuous a publication "must refer to a matter under consideration and constitute in effect a threat to its impartial disposition."

As has hereinbefore been pointed out, Judge Barns refused a preliminary injunction in the first Brook Club case upon the promise of defendants to put an end to gambling upon their premises. True, they said in their answer, they had permitted gambling in the belief it met with the approval of the law enforcement authorities. Subsequently, when there was a renewal of gambling at the Brook Club and the new State Attorney filed suit for injunction, after the taking of testimony Judge Holt granted a preliminary injunction. Months later, Judge Wiseheart, who had been informed by the State Attorney that he could not be present on that day, upon motion of counsel for the defendants vacated the preliminary injunction and dismissed the bill of complaint in the absence of the State Attorney who was engaged before the Grand Jury.

The order of dismissal was final. The matter was no longer pending.

Yet when petitioners commented upon the manner in which the Brook Club had eased itself out of the situation, Judges Barns and Wiseheart hauled them into court on a citation for contempt, convicted them, and fined them, which judgment was upheld by the Supreme Court of Florida.

The application for a preliminary injunction in the Teepee Club case was denied by Judge Holt in summary fashion, and, as petitioners herein have alleged, on the ground that the use of affidavits was reprehensive, in violation of the Florida statutes which unequivocally authorize the issuance of preliminary injunctions upon affidavit evidence. But the denial was final.

The rape indictments had been quashed by Judge Barns.

Therefore, in the light of this record whether the cases were pending or not, petitioners, under the ruling of this Court in the *Bridges* case, were free to comment upon the order of Judge Wiseheart vacating the preliminary injunction issued by another judge against the Brook Club and dismissing the bill of complaint. They were free to comment upon the order of Judge Holt denying the application of the State Attorney for an injunction against the operators of the notorious Teepee Club. They were free to comment upon the order of Judge Barns quashing the indictments against the defendants in the rape cases.

But the record is indisputable that none of these cases was pending, even in the sense of a case "pending", justifying a conviction for contempt under the application of the now discarded reasonable tendency rule.

There are innumerable decisions discussing the question as to whether a particular case is pending or not:

In *Craig* v. *Hecht*, *supra*, the petitioner had criticized the United States District Judge for the appointment of a receiver. The receivership and the main suit were still pend-

ing. In contempt proceedings (although the case was decided on a procedural question) Chief Justice Taft and Justice Holmes expressed their opinions on the merits and held that the matter had been concluded and free comment thereon could not be the subject of contempt proceedings, notwithstanding the severity of the criticism. Justice Holmes stated, "I do not see how to misstate past matters of fact of the sort charged here could be said to obstruct the administration of justice" (263 U. S. at p. 281).

In *Nixon* v. *State*, *supra*, the newspaper published an article criticizing the appointment of a receiver three months prior to the publication. Although the receivership proceeding was still pending, the publication was held to concern a matter not then pending and as such, privileged.

The case of *State ex rel. Pulitzer Publishing Co.* v. *Coleman, supra*, applies to petitioners' comment on the rape indictments in the case at bar. In the *Pulitzer* case a criminal dubbed "Puttynose" had been released by *nolle prosequi* of the indictment which had the same effect as the quashal of indictment in the case at bar. The newspaper criticized this action and was cited for contempt. The Missouri court reversed the conviction of contempt of the newspaper on the ground that the matter criticized was not still pending although the *nolle prosequi* could have been revoked during the term and the case could have been reinstated on the docket.

> "To rule otherwise would be to narrow the limits of permissible criticism so greatly that the right to criticize would cease to have practical value." (152 S. W. (2d) at p. 649.)

Even in Florida, it is provided that "nothing said or written or published, in vacation, to or of any judge, or of any decision made by a judge, shall in any case be construed to be a contempt". (Sec. 38.23, Fla. Stats. Annotated

1941.) Under this Statute, the Florida Supreme Court had held in *Ex Parte Earman, supra*, that criticism in Earman's newspaper of the circuit judge for admitting to bail an alleged criminal was not of a pending matter even though the trial upon appeal was still pending and had been set for a later date, holding that the order respecting bail had been concluded.

It is submitted that the above authorities are applicable here. The Brook Club case had been disposed of by final decree of dismissal. The application for preliminary injunction in the Teepee Club case had been disposed of by denial. The original indictments in the Rape Cases had been disposed of by an order quashing the indictments. The judge was not actually engaged in hearing nor in considering any of the matters and the particular matters had been ruled upon with finality.

Therefore, the Supreme Court of Florida erred in upholding the judgment of guilt on the theory that the cases were pending and petitioners' discussion thereof tended to obstruct the fair and impartial administration of justice in pending cases.

POINT 4

The holding of the Supreme Court of Florida that the convictions affirmed do not violate the constitutional guaranty of a free press is in conflict with the decisions of this Court in Near v. Minnesota, supra; Grosjean v. American Press Co., supra; DeJonge v. Oregon, supra; Herndon v. Lowry, supra; Lovell v. Griffin, supra; Cantwell v. Connecticut, supra; Bridges v. California, supra; Murdock v. Pennsylvania, supra; Thomas v. Collins, supra.

Each of the foregoing cases had to do in one way or another with restraint of free speech or free press.

This Court has held that subsequent punishment (but not contempt) for such abuses as may exist in respect of com-

ment upon the actions of public officials—including judges—is the appropriate remedy consistent with constitutional privilege.

This remedy was not invoked. Contrary to the provisions of the Fourteenth Amendment, and to the decisions of this Court, the complaining judges asserted the power to punish petitioners in a proceeding the very nature of which has been condemned by this Court. The procedure they invoked was repugnant to the guaranty of a free press contained both in the state and Federal constitutions. The convictions resulting should have been set aside by the Supreme Court of Florida in harmony with this Court's decisions. Its judgment affirming the convictions below is repugnant to the constitutional guaranties and should be set aside by this Court.

Moreover, after stating that the only question that could be raised in the proceeding went to the reasonableness, arbitrariness or the discriminatory character of the contempt, the Florida Supreme Court observed, somewhat critically of the petitioners, "this question appellants have by-passed and elected to stand on their immunity from punishment under the Fourteenth Amendment" (R. 166).

Why should these petitioners be criticized for standing upon constitutional rights? The record abundantly shows that law enforcement had fallen down miserably in Miami. The answer established that fact and the Grand Jury report more than supported it. The right, even the duty, of all vehicles of public information mandated the freest discussion and criticism. The petitioners did this, and no more. There was, in truth, no falsehood, no deception nor any misrepresentation. It has not yet been pointed out or shown wherein these newspaper editorials contained a single word that was untrue. The Florida courts were simply annoyed and irritated by well-deserved and vigorous comment.

The facts justified even stronger criticism. Certainly, every detail of the court's action could not be reported. As well might the newspaper be required, in order to escape summary punishment, to publish the entire transcript of the court's proceedings. The alleged omissions were not of material character.

The most recent case before this Court is that of *Thomas v. Collins, supra,* where a labor organizer, for speaking and soliciting membership at a meeting in Texas, had been, under the state statute, enjoined before the event, indicted criminally thereafter, and cited for contempt of the court order. This Court mentioned the delicacy of the intrusion by the Federal government on a State's power with respect to contempt proceedings, but held that the delicacy could not remove the duty of doing so, stating with respect to freedom of speech and of the press:

> "The right is a national right, federally guaranteed."

Concerning the necessity for a clear and present danger, the Court emphasized:

> "For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. * * * Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."

But as has hereinbefore been pointed out the vice in the decision of the Florida Supreme Court is that it simply refused to be bound by the *Bridges* case. In effect, the Florida Supreme Court says that the State laws and decision on contempt, not any Federal rule or decision, will be applied and cannot be questioned unless the State rule is

arbitrarily or unreasonably applied. Indeed, it states that:

> "• • • we find nothing in the Bridges case indicating a purpose to supersede State law and decisions on the question or *to require State courts to conform to Federal pattern.*" (R. 165) (Emphasis supplied).

The Florida Supreme Court implies that it feels that the Federal rule on contempt as announced in the *Bridges* case is an unwarranted construction of, and a recent interpolation in, the Bill of Rights:

> "The Fourteenth Amendment adopted in 1868 dealt with a subject matter entirely foreign to freedom of the press, but in Gitlow vs. New York, 268 U. S. 625, 45 Sup. Ct. 625, 69 L. Ed. 1138, decided in 1925, the court said that the Fourteenth Amendment extended the immunity in the First Amendment to the States. So it was not until 1925 that anyone dreamed that the Federal Constitution had anything to do with the punishment for contempt under state law" (R. 164).

Moreover, if the Florida Supreme Court is allowed to disregard the rule laid down in the *Bridges* case, then a different rule with respect to freedom of the press, as secured by the Federal Constitution, will obtain in each of the forty-eight States of the Union.

The *Bridges* and *Collins* decisions were designed forever to put an end to such an intolerable situation.

Conclusion

In the light of the record in this case it is impossible to escape the conclusion that the Florida courts have attempted to establish a rule in that State for the purpose of silencing the press through the assertion of unlimited power by judges to inflict summary punishment on the press without benefit of constitutional protection as directed by this Court.

Both the judgment of the complaining judges and that of the Supreme Court of Florida upholding their judgment finding petitioners guilty of contempt of court give evidence throughout of an attempt to surround judges with a protection against criticism or comment in a manner wholly disapproved by this Court as repugnant to the guaranties of the First Amendment.

We, therefore, respectfully urge upon this Honorable Court the reversal of the judgment of the Supreme Court of Florida in the case at bar.

Respectfully submitted,

ROBERT R. MILAM,
E. T. MCILVAINE,
Greenleaf Building,
Jacksonville 1, Florida;
EDWARD E. FLEMING,
Ingraham Building,
Miami 32, Florida;
ELISHA HANSON,
729 15th Street, N. W.,
Washington 5, D. C.,
Attorneys for Petitioners.

APPENDIX

Constitutional Provisions Involved

The First Amendment to the Constitution of the United States provides that:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides that:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 13 of the Declaration of Rights of the State of Florida provides that:

> "Every person may fully speak and write his sentiments on all subjects being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech, or of the press."

Statutory Provisions Involved

Section 2.01, Florida Stats. 1941, is as follows:

> "2.01. Common Law and certain statutes declared in force.—The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the

fourth day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the legislature of this state."

Sections 38.22 and 38.23, Florida Stats. 1941, read as follows:

"38.22. Power to punish.—Every court may punish contempts against it, but the punishment imposed by a justice of the peace shall not exceed twenty dollars fine or twenty-four hours imprisonment."

"38.23. Contempts defined.—A refusal to obey any legal order, mandate or decree, made or given by any judge either in term time or in vacation relative to any of the business of said court, after due notice thereof, shall be considered a contempt, and punished accordingly. But nothing said or written, or published, in vacation, to or of any judge, or of any decision made by a judge, shall in any case be construed to be a contempt."

Sections 64.11 and 64.12, Florida Stats. 1941, read as follows:

"64.11. Abatement of nuisance; parties, by whom maintained.—Whenever any nuisance as defined in Sec. 823.05 is kept, maintained or exists, the state's attorney, county solicitor, county prosecutor, or any citizen of the county through any attorney he may select, may maintain his action by a bill in chancery in the proper court in the name of the State of Florida upon the relation of such attorneys or citizen to enjoin said nuisance, the person, or persons conducting or maintaining the same and the owner or agent of the building or ground upon which said nuisance exists."

"64.12. Abatement of nuisances; temporary injunctions.—In such action the court, judge or court commissioner before whom the bill may be brought may upon proper proof being made allow a temporary writ

of injunction without bond. If it shall appear to the satisfaction of the court, judge or court commissioner *by evidence or by affidavit* that a temporary injunction shall issue, the court, judge or court commissioner may in his discretion pending the determination of the bill of a final hearing enjoin (1) the conducting or maintaining of a nuisance; (2) the operating and maintaining of the place or premises where the nuisance is conducted or maintained; (3) the owner or agent of the building or ground upon which the nuisance exists; (4) and the conduct, operation or maintenance of any business or activity operated or maintained in the building or on the premises in connection with or incident to the conducting or maintenance of the nuisance. Such injunction order shall definitely specify the activities enjoined and shall not preclude the operation of any lawful business not conducive to the maintenance of the nuisance complained of: At least three days notice in writing shall be given defendant or defendants of the time and place of application for said temporary injuction." (Emphasis supplied.)